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Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-813

ARMANDO CAPONIGRO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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United States

OCTOBER TERM, 1972

NO. _____

ARMANDO CAPONIGRO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, ARMANDO CAPONIGRO, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered August 25, 1972, and denial of Petition for Rehearing entered without opinion on October 4, 1972.

(a) JURISDICTION

Jurisdiction of this Court is invoked under the provisions of Rule 19(b) of the Supreme Court Rules, specifically in that the Courts below have decided a Federal question in a way in conflict with applicable decisions of this Court and have departed from the accepted and usual course of judicial proceedings in such manner as to call for exercise of this Court's power of supervision.

The judgment of conviction was entered in the U.S. District Court for the Southern District of Florida on September 30, 1971. The opinion sought to be reviewed was entered August 25, 1972 (a copy is appended as Exhibit 'A'). The order denying rehearing was entered October 4, 1972 (a copy is appended as Exhibit 'B'). Order extending time for filing Petition for Writ of Certiorari was entered on November 6, 1972 (a copy is appended as Exhibit 'C').

The statutory provision believed to confer jurisdiction to review the foregoing judgments and opinions is Title 28, Section 1254 (1).

(b) QUESTIONS PRESENTED FOR REVIEW

I

WHETHER A CONVICTION OF EXTORTION CAN LEGALLY BE ENTERED WHEN ALL THE EVIDENCE SHOWS THAT ALL MONIES INVOLVED WERE PAID VOLUNTARILY.

II

AT A TRIAL THE INTRODUCTION INTO EVIDENCE OF PRIOR UNSWORN TESTIMONY GIVEN UNDER DURESS AT A UNION HEARING DEPRIVES A DEFENDANT OF HIS FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION, AND SIXTH AMENDMENT RIGHT TO COUNSEL.

(c) CONSTITUTIONAL PROVISIONS

The following Constitutional provisions are involved:

Amendment V

"No person shall . . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The following statute is involved:

Title 18, § 1951(b)(2)

> "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

(d) STATEMENT OF THE CASE

An Indictment was returned in the United States District Court for the Southern District of Florida charging petitioner with obstruction of interstate commerce by extortion in violation of Title 18, USC 1951. Count I charged that petitioner extorted Five Hundred and Forty Three Dollars from C. A. Gibeaut by force and fear in threatening work stoppages and other labor troubles. Count II charged that petitioner obstructed commerce by attempting to obtain property through wrongful use of force and fear by threatening a representative of C. A. Gibeaut Company.

In 1969 C. A. Gibeaut Company was a sub-contractor, doing concrete work on a major apartment house project in Hallandale, Florida. Gibeaut ordered plywood and four by fours from a company located in Ohio. Goods were shipped in interstate commerce to Gibeaut.

William Orton was a Vice President of the company. (Tr. 578). William Harrington was Superintendent of the project in 1969. (Tr. 64). Petitioner, Armando Caponigro was a shop steward employed primarily by Burk Builders, the contractor on the job. (Tr. 66).

In February or March of 1969 Caponigro wanted to borrow Five Hundred Dollars from C. A. Gibeaut Company. He made the request to Orton. The request was denied the next day.

In July of 1969, Caponigro was put on the C. A. Gibeaut payroll by Orton. Caponigro was paid July 23, 1969, July 30, 1969, August 6, 1969, August 13, 1969 and August 20, 1969. (Tr. 97). He was not paid thereafter. (Tr. 104). There were no other conversations between Orton and Caponigro other than a request, at Christmas of 1969, for a Christmas bonus. The request was turned down. (Tr. 105-106). The checks paid to Caponigro totaled Five Hundred and Forty Three Dollars. (Tr. 192).

Harrington met Caponigro in December of 1968. (Tr. 112). Caponigro asked Harrington for a kickback after a carpenter's strike had terminated. The request was rejected. (Tr. 113). The same request was made a few times thereafter. (Tr. 114). Harrington explained that he had no power to acceed to the request. (Tr. 115). During the period that Caponigro was paid, Harrington was out of town for two and one-half weeks. They had no conversation during the July and August period of payments. (Tr. 118-119).

After the last payments had been made, Harrington stated that Caponigro requested more money and said he could make it tough on him, if he didn't come across. (Tr. 121). No further payments were made. There were no conversations with Caponigro until just prior to Christmas of 1969. (Tr. 127). At Christmas time Caponigro asked for a bonus again. Harrington told him it had been received during the summer. Harrington stated that

Caponigro threatened him with a .45. (Tr. 131). Harrington told Caponigro, "You must be nuts or crazy". He then called the police. (Tr. 132). At that time some men attempted to stop Harrington from leaving work. Caponigro was present. (Tr. 134).

Harrington admitted that Caponigro did not ask for a kickback, but asked for a bonus. [Tr. 172). He also testified that of the Five Hundred and Forty Three Dollars received by Caponigro, about the sum of Two Hundred odd Dollars was actually due the latter. (Tr. 193).

At the trial the government produced a Court Reporter who testified to the veracity of a portion of a transcript containing unsworn statements made by Caponigro at a union meeting where he had been called to respond to union charges. Caponigro's statements were read to the jury over the strenuous objections of his attorneys. In his statement read to the jury by the Court Reporter Caponigro had stated essentially that he had been accused of taking a bribe, and that actually the money received by him had been taken with the understanding that William Orton was to receive half. The reporter also testified that Caponigro had stated at the union hearing that Orton did in fact receive half. The objection to the introduction of the testimony was supported by Caponigro's testimony at trial that his appearance before the union examiner was under duress and coercion. He testified that he had to appear and respond to questions or he would have been suspended from the union and his position lost. (Tr. 250-251).

(e) REASONS FOR ALLOWANCE OF THE WRIT

I

WHETHER A CONVICTION OF EXTORTION CAN LEGALLY BE ENTERED WHEN ALL THE EVIDENCE SHOWS THAT ALL MONIES INVOLVED WERE PAID VOLUNTARILY.

In this case there is no contention that any force or fear was inflicted by petitioner prior to July of 1969. The testimony concerned implied threats which were made after the last check of August 1969. No money was received after Harrington returned from vacation, which was after the checks had been received. There could have been no extortion resulting in obstruction of commerce after that time since no money was received by Caponigro after that time. It was never contended that any threats were made to Orton. The most that can be gleaned from the testimony is the possibility of extra pay given a shop steward by way of a bribe.

This Court considered the Hobbs Act in **Stirone v. United States**, 361 US 212, 4 L ed 2d 252, 80 S. Ct. 270 (1960). It was stated there:

> "Here, as the trial court charged the jury, there are two essential elements of a Hobbs Act crime: interference with commerce, and extortion. Both elements have to be charged. Neither is surplusage and neither can be treated as surplusage. The charge that interstate commerce is affected is critical since the Federal Government's juris-

> diction of this crime rests only on that interference. It follows that when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened."

Extortion is defined in Title 18, Section 1951 (b)(2):

> "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

There is certainly no force, violence or threats here as appeared in the facts of **Esperti v. U.S.**, 406 F. 2d 148, cert. den. 91 S. Ct. 241, 400 U.S. 942, 27 L. ed. 2d 246 (1969).

A difference between Title 18, Section 1951 and Title 18, Section 1952 is applicable to this case. In Section 1952, the "travel act" bribery is an included offense. Bribery is not included in Section 1951.

At the time the checks were received in July and August of 1969 no fear had ever been created, either on the part of Orton or Harrington. No violence had existed; no threats had been made.

In fact Harrington agreed that about one-half of the money received by Caponigro was due. (Tr. 193). That admission makes it clear that the money was given volun-

tarily and not through coercion albeit the checks were not stopped as soon as Orton and Harrington wanted. The genesis of the payment was not, however, extortion.

It is also clear that under this situation none of the proof of the elements necessary under **Stirone**, supra, existed. No interference with commerce resulted from force, violence or fear. The mere fact that C. A. Gibeaut Company did business with an Ohio firm in no way proves interference with interstate commerce, merely the existence of interstate commerce.

The Harrington threat, charged under Count II, took place at Christmas time, 1969. It never resulted in payment of money, and interference of any kind with commerce. It would at most, have presented a State charge of assault or attempted assault. There was certainly no interference with interstate commerce in the personal threat against an employee who swore that he was without power to make any payments.

The holding in this case and the conviction of Petitioner is in total conflict with Title 18, Section 1951 as interpreted by this Court in **Stirone**, supra.

II

AT A TRIAL THE INTRODUCTION INTO EVIDENCE OF PRIOR UNSWORN TESTIMONY GIVEN UNDER DURESS AT A UNION HEARING DEPRIVES A DEFENDANT OF HIS FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION, AND SIXTH AMENDMENT RIGHT TO COUNSEL.

The conviction and affirmation are completely at odds with the rule of law announced by this Court in **Garrity v. State of New Jersey**, 385 US 493, 17 L. ed. 2d 562, 87 S. Ct. 616 (1967) and **Spevack v. Klein**, 385 US 511, 17 L. ed. 2d 574, 87 S. Ct. 625 (1967).

In this case Petitioner testified and the testimony was uncontradicted. He testified that he was called by telegram to appear before the union; that he was told by a high ranking union official that he had to testify or "lose his book"—that he would be thrown out of the union. (Tr. 250-251). He would not have testified without that warning by the union official. (Tr. 252). Before the notes of his testimony were read to the jury the court was advised that Petitioner had not been represented at the union hearing by counsel. (Tr. 276).

Nonetheless, over objection by counsel Petitioner's testimony at the union hearing was read, in part, to the jury.*

Garrity, supra, specifically held that in subsequent criminal proceedings, statements received in prior coerced hearings could not be introduced. As a matter of fact two of the difficulties found in the dissenting opinion in **Garrity**, do not exist in this case. There were no Constitutional warnings given in the case at bar and Petitioner was not represented by counsel in this case.

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*Although counsel at the trial acceded to the introduction of the testimony that position was taken only after the Court refused to suppress the Court Reporter's testimony.

CONCLUSION

Petitioner respectfully urges the granting of the Petition for Writ of Certiorari.

Respectfully submitted,

MILTON E. GRUSMARK
Attorney for Petitioner
1720-79th Street Cswy., Suite 110
Miami Beach, Florida 3341

By _____
MILTON E. GRUSMARK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing Petition for Writ of Certiorari were mailed to the Attorney General's Office, 1350 N.W. 12th Avenue, Miami, Florida 33136, this 1st day of December, 1972.

MILTON E. GRUSMARK

EXHIBIT "A"

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ARMANDO CAPONIGRO,
Defendant-Appellant.

No. 71-3495

United States Court of Appeals, Fifth Circuit.

Aug. 25, 1972.

Rehearing and Rehearing En Banc
Denied Oct. 4, 1972.

* * *

PER CURIAM:

The indictment charged the defendant with having obstructed and affected interstate commerce by extortion in violation of the Hobbs Act, 18 U.S.C. § 1951. Both counts charged that the defendant was employed as a shop steward.[1]

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[1]The indictment charged:

"That at all times hereinafter mentioned, defendant ARMANDO CAPONIGRO was employed by the prime contractor Burk Brothers, Inc., as shop steward for members of Local 1947, United Brotherhood of Carpenters and Joiners of America, employed by Burk Brothers, Inc., and as shop steward was the representative of said Union members on said Hemispheres Site and personally responsible for receiving and handling grievances of Union members."
(R. 617.)

Count 1 covered a period from November 1, 1968 to August 20, 1969 and charged that during that period the defendant threatened C. A. Gibeaut, Inc., the subcontractor for concrete form work, with work stoppages and other labor troubles, and by such extortion demanded and obtained $545.30 in checks from C. A. Gibeaut, Inc.

Count 2 covered a period from August 27, 1969 to December 26, 1969 and charged that during that period the defendant threatened C. A. Gibeaut, Inc. and its representative William Harrington with work stoppage and labor problems and did in fact slow down and delay the work by calling Union carpenters off the site and slowing down their production. Count 2 further charged that the defendant attempted to extort money by personally threatening William Harrington on December 26, 1969, in violation of the Hobbs Act.

The jury found the defendant guilty on both counts. After entering its judgment of conviction and denying the defendant's motion for new trial, the court sentenced the defendant to imprisonment for 10 years on each count, the sentences to run concurrently.

The defendant presents thirteen numbered issues for review on appeal, including the denial of a continuance, the denial of motions to dismiss the indictment, for better response to a bill of particulars, for subpoena fees and investigative costs, various evidentiary rulings, the court's refusal to charge the jury that bribery and extortion are mutually exclusive crimes, a claim that "the verdict was against the weight of the evidence," and finally that "an accumulation of errors deprived the defendant of a fair trial."

A careful study of the record, including a typed transcript of more than 600 pages, in the light of the briefs and oral arguments has convinced us that no reversible error was committed. In our opinion, the Government's brief adequately responds, though in different order, to each of the issues presented for review by the defendant. The question of the defendant's guilt was for the jury, and the evidence was ample to support its verdict. The judgment is therefore.

Affirmed.

EXHIBIT "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3495

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ARMANDO CAPONIGRO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion Aug. 25, 1972, 5 Cir., 1972, ____ F.2d ____).

(October 4, 1972)

Before BROWN, Chief Judge, and RIVES and CLARK, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

EXHIBIT "C"

SUPREME COURT OF THE UNITED STATES

No. A-482

ARMANDO CAPONIGRO

Petitioner

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 3, 1972.

s/ Lewis F. Powell, Jr.

Associate Justice of the Supreme Court of the United States

Dated this 6th day of November, 1972.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-813

ARMANDO CAPONIGRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 465 F. 2d 374.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1972. A petition for rehearing was denied on October 4, 1972. Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to December 3, 1972, and on Monday, December 4, 1972, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

494-014—73——1

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for violating the Hobbs Act.

2. Whether the trial court erred in admitting testimony of petitioner made at a union disciplinary hearing.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on two counts of having obstructed and affected interstate commerce by means of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951. He was sentenced to concurrent ten-year terms of imprisonment. The court of appeals affirmed *per curiam* (Pet. App. A).

1. The evidence at trial showed that on or about April 1, 1969, William Harrington became general superintendent for C. A. Gibeaut, Inc., the sub-contractor at a building construction site in Hallendale, Florida (Tr. 58).[1] Harrington arrived during a carpenters' strike which lasted until April 10, 1969 (Tr. 110–111, 148). When the strike ended, petitioner, the head steward for the carpenter's union, approached Harrington, noted that there were no union problems, and asked for a "kickback" or "bonus." Harrington said he could not give petitioner any kickback and that petitioner would have to see Harrington's boss,

[1] "Tr." refers to the trial transcript which is on file with the Clerk of this Court.

William Orton, the vice-president of the sub-contractor (Tr. 113, 172).[2] Several times after this conversation petitioner approached Harrington and asked about his "kickback." When the first payroll check after the strike was issued, petitioner inquired why there was not "anything" in his pay check from Harrington. The following week petitioner approached Harrington three or four more times with similar requests; Harrington told him to see Orton (Tr. 113–114). Not long thereafter petitioner again spoke with Harrington and stated: "You know, I can make it awfully rough for you if you don't come across." Harrington acknowledged petitioner's remark and said that Orton was the one to see (Tr. 115).

After this conversation, Harrington spoke with Orton in May or June 1969, and they both met later with Joe Fante, the vice-president of the contractor, Burk Builders, at his trailer on the construction site. At the conclusion of this meeting Harrington and Orton met again, and Orton instructed Harrington to put petitioner on the subcontractor's payroll for one day's pay per week (Tr. 93–95, 115–117, 191–193). Petitioner, although an employee of the contractor, was never asked to do any work for the sub-contractor, and performed no work for his one day's pay per week (Tr. 99, 117–118, 120–121).

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[2] Orton testified that in February or March 1969, petitioner came to him and wanted to borrow $500 from the sub-contractor to buy a truck. Orton conferred with his boss and reported that the company would not lend that much money (Tr. 63–69).

Harrington and Orton testified they had paid petitioner in order to prevent any union trouble or delays on the job (Tr. 194, 304). Harrington also testified that he was aware of the capability of stewards to cause trouble and that firing a steward for cause was a time-consuming process (Tr. 203).

Pursuant to the agreement to pay the petitioner a sum equivalent to one day's work per week, the subcontractor issued a weekly check for the period commencing on July 23, 1969 [3] and ending on August 20, 1969 (Government's Exhibits 6–10). When Harrington returned from a two and one-half week vacation which he took at the end of July, he discovered that petitioner was being paid by both the contractor and the sub-contractor on a forty-hour per week basis. Harrington spoke with the timekeeper and then with Orton, and fired the timekeeper. He also stopped payment on petitioner's last check (Tr. 118–119, 191).

On the following Monday, petitioner asked Harrington where his bonus was. Harrington explained that petitioner had received his bonus while Harrington was away and that no more money would be forthcoming. Petitioner then repeated his earlier threat that "I can make it awfully rough on you if you don't come across" (Tr. 121). For several weeks thereafter there were labor problems at the construction site.

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[3] Sometime in July, 1969, prior to the issuance of the first check, petitioner approached Orton and asked Orton to take care of him; around the same time petitioner also went to Harrington, explained that he had purchased a new truck, and expressed a need for some money (Tr. 102–103, 136).

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2. Prior to Christmas 1969, petitioner approached Orton and asked where his Christmas bonus was. Orton explained that as far as he was concerned petitioner had already received his bonus (Tr. 105–106). During this same time period petitioner also twice approached Harrington and inquired about his bonus, repeating on one occasion his threat "to make it awfully rough on you if you don't come across." Each time Harrington reiterated that the bonus had been paid while he was on vacation and that petitioner was not getting any more (Tr. 129–130).

On December 26, 1969, Harrington was informed of a work stoppage on the bay side of the project; when he arrived petitioner was there and told Harrington to come with him. Thinking that a business agent wanted to see him, Harrington went with petitioner into the basement of one of the buildings on the site (Tr. 130–131). Once they were inside, petitioner positioned himself between Harrington and the entrance, placed a pistol against Harrington's chest and threw him against the wall saying: "I'll blow your damn heart out" or words to that effect. Harrington asked petitioner if he was crazy, to which petitioner responded: "You didn't give me any bonus. You're going to get yours now." Harrington pushed petitioner's hand down, ran out of the building and called the police (Tr. 131–132).

ARGUMENT

1. a. Petitioner contends that the evidence was insufficient to support his conviction for extortion since the trial testimony allegedly showed that the monies

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were paid voluntarily and not as a result of fear or threats.[4] The Hobbs Act (18 U.S.C. 1951(b)(2)) defines extortion as: "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear * * *." Such fear includes fear of economic harm. See *United States* v. *Addonizio,* 451 F. 2d 49 (C.A. 3), certiorari denied, 405 U.S. 936; *United States* v. *Tropiano,* 418 F. 2d 1069, 1083 (C.A. 2), certiorari denied, 397 U.S. 1021. A direct threat is not necessary to constitute the crime of extortion under the Hobbs Act. All that is necessary is that the accused induced his victim to part with his property through the use of fear, *United States* v. *Tolub,* 309 F. 2d 286, 289 (C.A. 2), and that the victim's fear is reasonable. *Carbo* v. *United States,* 314 F. 2d 718, 740 (C.A. 9), certiorari denied, 377 U.S. 953. Veiled threats are as much proscribed by the Hobbs Act as express ones. *United States* v. *Dale,* 223 F. 2d 181 (C.A. 7).

Here, the evidence showed that the sub-contractor's representatives, Orton and Harrington, agreed to place petitioner on their payroll solely for the purpose of avoiding the labor troubles petitioner threatened. With respect to the second count of the indictment, which referred to the threat petitioner made to Har-

[4] Petitioner makes no attempt to argue that his status as a union official gives him any immunity from the provisions of the Hobbs Act, but simply challenges the sufficiency of the evidence that he derived personal pecuniary benefits by extortion. Thus, there is no need to defer action on this petition pending a decision in *United States* v. *Enmons,* No. 71-1193, argued December 4, 1972.

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rington after Christmas, 1969, the evidence showed that there was no voluntary offer of money by Harrington but rather an attempt by petitioner to extort money from the sub-contractor by threatening to shoot him.

b. Petitioner also contends that there was no showing that his extortion affected interstate commerce.

As this Court said in *Stirone* v. *United States,* 361 U.S. 212, 215, the Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws such interference 'in any way or degree.' " Thus only a minimal impact on commerce is required to sustain a conviction under the Act. *United States* v. *Hyde,* 448 F. 2d 815, 836–837 (C.A. 5), certiorari denied, 404 U.S. 1058; *United States* v. *Tropiano, supra.* See *Katzenbach* v. *McClung,* 379 U.S. 294; *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241. A sufficient nexus with interstate commerce was shown here by the depletion of the business's resources due to extortionate payments (see *United States* v. *Amabile,* 395 F. 2d 47, 49 (C.A. 7), vacated and remanded on other grounds *sub nom. Giordano* v. *United States,* 394 U.S. 310; *United States* v. *Provenzano,* 334 F. 2d 678, 692 (C.A. 3), certiorari denied, 379 U.S. 947), coupled with the fact that the extorted business purchased and sold products that travelled in interstate commerce.

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See *Addonizio, supra; United States* v. *DeMasi*, 445 F. 2d 251, 257 (C.A. 2), certiorari denied, 404 U.S. 882.[5]

2. In February 1971, a committee from the national headquarters of the United Brotherhood of Carpenters and Joiners of America held hearings in Miami regarding the operation of the local union.[6] When the government sought to introduce the transcript of these hearings defense counsel initially objected on several grounds. After a hearing out of the jury's presence, the court indicated that it would permit introduction of the transcript but would withhold its ruling overnight to permit petitioner's counsel to research the questions of law involved (Tr. 272–273, 276). When court reconvened, petitioner's counsel indicated that after researching the questions nothing had been found to "contradict or basically contradict the Government's position," and stated that the defense "waive[d] any objection to that portion of the transcript" the government sought to introduce, and, alternatively, moved for the admission of the entire

[5] For example, in the course of performing its work at this site C. A. Gibeaut, Inc., the sub-contractor, ordered plywood and four by fours from Kirkpatrick Lumber Company, Cincinnati, Ohio (Tr. 25–26, 28–31, 59–60). The sub-contractor placed orders with Kirkpatrick from September 1968 until December 1969 and the goods ordered from Kirkpatrick were usually shipped from Oregon and Washington to the sub-contractor in Florida (Tr. 31). These were the materials on which the carpenters worked.

[6] Present at these hearings was Miss Rosalyn Burstein, a stenographer, who took notes that were later transcribed and who testified at trial that the transcript was a true and accurate carbon copy of the testimony she heard (Tr. 223–225, 235–237).

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transcript into evidence (Tr. 286, 289). After the transcript was admitted into evidence, partly as a government exhibit and partly as a defense exhibit, a portion of the transcript was read to the jury in which petitioner examined five checks and stated that it was his endorsement on the back of the checks (Tr. 297, 299).

Petitioner contends that the introduction of the testimony from the union hearings violated his Fifth and Sixth Amendment rights. It is evident, however, that petitioner waived any objections to the exhibits. See *Johnson* v. *United States*, 318 U.S. 189, 199–201; *Hyler* v. *United States*, 402 F. 2d 558, 561 (C.A. 5), certiorari denied, 394 U.S. 908.[7]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

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[7] In any event there is no basis for petitioner's objection that the introduction of his testimony at the union meeting violated his privilege against self-incrimination. His situation is no different from that of a private employee being questioned by his employer with respect to his job and under the threat of loss of employment if he refuses to answer. No governmental compulsion was involved here. Reliance on *Garrity v. New Jersey*, 385 U.S. 493, and *Spevack v. Klein*, 385 U.S. 511, is misplaced. In both cases the questioning was by a governmental agency and the Fifth Amendment became relevant because it protects against the government's compelling a person to incriminate himself.

U.S. GOVERNMENT PRINTING OFFICE: 1973

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SUPREME COURT, U. S.
FILED
FEB 15 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-813

ARMANDO CAPONIGRO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF HUGH J. ADDONIZIO AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-813

ARMANDO CAPONIGRO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF HUGH J. ADDONIZIO AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Interest of Hugh J. Addonizio

On September 24, 1970, judgment of conviction was entered against Hugh J. Addonizio pursuant to a jury verdict. The crimes with which Mr. Addonizio was charged were extortion and conspiracy to commit extortion under the Hobbs Act, 18 U.S.C., Section 1951. The United States Court of Appeals for the Third Circuit affirmed the conviction and this Court denied Mr. Addonizio's Petition for Certiorari on February 22, 1972.

Addonizio in his Petition for Certiorari, as Petitioner Caponigro in the instant case, requested that this Court decide whether under the Hobbs Act the crimes of extortion and bribery are mutually exclusive and whether the trial court must so charge the jury, specifically differentiating between the two crimes, where the evidence introduced at trial raises a factual question as to which crime was committed.[1]

Reasons for Granting the Writ

This case presents the Court with the opportunity to clarify the scope of a federal criminal statute under which many indictments are prosecuted each year, but which has neither adequately nor uniformly been interpreted by the lower Federal courts.

The definitions of "extortion" and "robbery" as they appear in the Hobbs Act were copied substantially from the New York Code. After reviewing the legislative history of the statute, the Third Circuit held that in interpreting the Hobbs Act it was required to look to the New York Penal Laws and the construction given them by the New York courts. *United States* v. *Nedley,* 255 F.2d 350, 355 (3 Cir. 1958).

Under the New York law upon which the Hobbs Act was based, former New York Penal Law §§ 850, et seq., bribery and extortion were mutually exclusive crimes. See e.g., *People* v. *Feld,* 262 App. Div. 909 (2d Dep't. 1941), 28 N.Y.S. 2d 796 (Sup. Ct. 1941); *People* v. *Dioguardi,* 8 N.Y. 2d 260, 273 (1960); *Hornstein* v. *Paramount Pictures, Inc.,* 22 Misc. 2d 996 (Sup. Ct. 1942), *aff'd,* 266 App. Div. 659 (1st Dep't.), *aff'd.* 292 N.Y. 468 (1943).

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[1] The written consents of both the Petitioner and the Respondent are being filed simultaneously with this brief.

In *Feld,* the Court stated:

> "The evidence was ample to establish the crime charged against him in the indictment. We are, nevertheless, constrained to reverse the judgment because there was error in the charge of so substantial a character that it cannot be disregarded. The defense was that the employer, instead of being a victim of extortion, had bribed the representatives of the labor union in violation of section 380 of the Penal Law. That this was the theory of the defense is indubitably established by the exception taken to the Court's charge . . . . The evidence was overwhelmingly the other way, but a question of facts was presented and the appellant was entitled to have the jury instructed that if the employer were guilty of bribery, the appellant could not be guilty of exortion. The two crimes are mutually exclusive." *supra,* 262 App. Div. at 909, 28 N.Y.S. 2nd, at 797.

Had it been the intention of Congress to broaden the scope of the crimes prescribed by the Hobbs Act beyond the New York statute it could have easily done so. See, for example, Title 18 U.S.C. Section 1952 enacted by Congress in 1961. The definition of "unlawful activity" thereunder is defined in part as: "extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.", 18 U.S.C. Section 1952 (b) (2). The penalty for a violation of 18 U.S.C. Section 1952 is imprisonment for not more than five years or a fine of $10,000.00. The penalty for a violation of Title 18 U.S.C. Section 1951 is imprisonment for a period of twenty years.

In *United States* v. *Kubacki,* 237 F.Supp. 638 (E.D. Pa. 1965) the defendant was indicted under both 18 U.S.C.

Section 1951 and 18 U.S.C. Section 1952. Kubacki was the Mayor of Reading, Pennsylvania and one Roger Weidlich was a salesman for a parking meter company. In a meeting between Weidlich and Kubacki, Kubacki indicated that the city of Reading would purchase parking meters from Weidlich's company and suggested a political donation of $15.00 per meter. Other city officials recommended to Weidlich by the Mayor made it clear that the "suggestion" was actually a demand and Weidlich testified that he believed he would lose the order if he did not make the donation. An agreement was reached by which $6.00 per meter was paid.

At page 641 the Court stated:

> "In simple terms, the government charged that these people were compelled to make a payoff for the privilege of bidding, i.e., for the privilege of competing for the award of the parking meter contract. The evidence established, instead, that Weidlich and Roach were bargaining for improper influence, for favored treatment, i.e. they were bargaining for the improper award of the contract to them without the necessity to compete."

The Court looked to the New York decisions for the definition of extortion, cited *People* v. *Dioguardi, supra,* for the proposition that, "one who pays a bribe is equally as guilty as the one who receives it, 'which could never be the case with extortion'" *supra,* 641; and then applied the distinction between the crimes of bribery and extortion as set forth in that case, concluding that as a matter of law the evidence did not sustain a conviction on charges of extortion. Accordingly, the motion for acquittal on those counts brought under Title 18 U.S.C. Section 1951 was granted. The motion for acquittal on those counts brought under Title 18 U.S.C. Section 1952 was denied.

In *United States* v. *Addonizio,* 451 F.2d 49 (3rd Cir. 1972), *cert. denied,* 405 U.S. 936, the sole defense of several of the defendants was that the evidence, if proving any crime, proved bribery rather than extortion. All defendants joined in requests that the trial court charge the jury that the two crimes were mutually exclusive specifically differentiating between the elements of each crime. Apparently agreeing that the evidence at least presented a jury question, the Third Circuit wrote:

> ". . . [W]hile the contractors' advance knowledge that a kickback would be required might give rise to a jury question as to whether the transactions were briberous or extortionate, we cannot agree that advance knowledge alone conclusively establishes bribery." *supra,* 73

The only charge touching on the issue given to the jury was that the jury had to find the defendants had "wrongfully used actual fear . . . in order to induce Constrad to pay them money . . . [U]nless the payments here alleged were made under some form of compulsion, there is no crime under the Hobbs Act. The mere voluntary payment of money, unaccompanied by any [fear] of economic loss, would not constitute extortion." The Court held:

> "Even assuming *arguendo* that the appellants are correct as to the state of the evidence and as to the mutual exclusivity of the crimes we have concluded that no error was committed, for the court delivered an adequate charge on the legal questions involved." (footnote omitted) *supra,* 77

If the crime of extortion under the Hobbs Act is inconsistent with the crime of bribery, we submit that a charge such as the one given in *Addonizio,* where a factual issue

as to which crime was committed was presented, is wholly inadequate. There the trial court refused even to use the word "bribery". The limited charge which it did give was meaningless without further definition of the terms, "voluntary", "compulsion", and "fear of economic loss".

Other federal courts have reached the conclusion that under the Hobbs Act extortion is not mutually inconsistent with bribery and that bribery and extortion may or may not have both been committed in a given transaction, depending upon the facts of the case. *United States* v. *Pranno,* 385 F.2d 387 (7th Cir., 1967), *cert. denied,* 390 U.S. 944 (1967). See also *Bianchi* v. *United States,* 219 F.2d 182 (8th Cir., 1955), *cert. denied,* 349 U.S. 915; *Esperti* v. *United States,* 406 F.2d 148, (5th Cir., 1969), *cert. denied,* 394 U.S. 1000.

We respectfully submit that the federal cases dealing with extortion under the Hobbs Act have left unsettled the question of whether the New York decisions construing the New York statute upon which the Hobbs Act was based should be followed. These decisions held that the crimes of bribery and extortion are mutually exclusive. It is further respectfully submitted that guidance from this Court is required on the question of the adequacy of jury instructions differentiating between the crimes of bribery and extortion where the evidence has presented a factual question as to which crime was committed.

CONCLUSION

It is therefore respectfully urged that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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